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Gregory James Woodhouse, by and Through His Guardian Ad Litem, Glen W. Woodhouse, and Glen W. Woodhouse v. Norma Johnson : Brief In Support of Petition

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Recommended Citation

Response to Petition for Rehearing, *Woodhouse v. Johnson*, No. 10810 (1967).
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IN THE SUPREME COURT

of the

STATE OF UTAH

GREGORY JAMES WOODHOUSE, by
and through his guardian ad litem,
GLEN W. WOODHOUSE, and GLEN
W. WOODHOUSE,

Plaintiffs and Appellants,

v.

NORMA JOHNSON,

Defendant and Respondent.

Case No.
10810

BRIEF IN SUPPORT OF PETITION

STATEMENT OF FACTS

On January 18, 1968, this Court issued its decision

sustaining the propriety of the lower court's giving of instruction No. 18 (R. 90), which was a combined instruction reading as follows:

"The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident, he has no rights to recover, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages.

"The mere fact that an accident happened is not evidence of negligence on anyone's part."

without defining what event or occurrence was claimed by the defendant-respondent to have been unavoidable or unforeseeable. In addition, this Court sustained the lower court's failure to instruct the jury on one of appellant's theories of negligence, to wit: The jury could find that respondent was not negligent in the backing of her automobile, but was negligent in the forward operation of the same after receiving warning of a collision with something or someone. From the majority of this Court's ruling on the two principal points claimed by appellant as error, and the failure of this Court to remand this case for a new trial with instructions on these points, and thereafter on Point II raised in appellant's brief, which point was not in the opinions of this Court, appellant petitions for a rehearing.

ARGUMENT

POINT I

THE MAJORITY OF THE COURT MISCONSTRUED
THE NATURE OF UNAVOIDABLE ACCIDENT IN-
STRUCTION.

In the preparation of their brief and at the time of the oral argument, appellants did not wish to leave the impression with this Court that *per se* an instruction on unavoidable accident is never proper under the status of the case law of this State and of the cases in some of the other states.

It is conceivable, under an appropriate fact situation, for such an instruction to be proper, i.e., *Porter v. Price*, supra, when a companion instruction defines the fact situation claimed to have been an unavoidable or unforeseen occurrence, happening without warning and totally as the result of the actions of another person, an act of God, or unwarned physical breakdown. Such is not the fact situation in this case. Issues existed, as shown in the majority opinion, wherein the jury was instructed on the defendant's duties of lookout, vehicular control, pedestrian right of way, and backing from private driveways, evidencing a question of fact having been present for the jury to determine whether defendant was acting in a fashion obligatory of a reasonable prudent driver, however, at no time was the jury instructed, nor did the majority of opinion determine, what claimed unavoidable occurrence may have transpired, warranting

the trial court's giving of the instruction complained of, and such consideration is absent from the majority opinion. Respondent's brief cites JIFU as approval for this instruction and as authority for the same. It is conceded that instruction No. 16.1 contained therein is verbatim the portion complained of in instruction No. 18, however, what courts and lawyers may have believed to have been the law in 1957 does not necessarily hold true indefinitely. JIFU does not hold for the proposition that 16.1 should be given as a companion instruction to 16.6, nor does it hold that a jury should merely be told such a defense is available without a definitive instruction under the facts of the particular case. For the majority of this Court to hold that an "unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence . . ." leaves to conjecture under the facts of this case *which act, or which occurrence, or which injury, under what evidence* was unavoidable, and therefore is prejudicial to plaintiffs' position as a jury is permitted to speculate on the entire episode as being unavoidable when plaintiffs are bound to prove specific acts of negligence, i.e. lookout, right of way, duty of care in backing, etc.

In each instance in which this Court has considered the propriety of an unavoidable accident instruction, petitioner herein cannot find where it has affirmed the giving of a second instruction, commonly referred to as a "no negligence" instruction, simultaneously submitted to the jury. Further, petitioner can find no case in any jurisdiction warranting these dual instructions. The ap-

parent rationale of courts considering this problem would be one of the following:

A. Defendant acted as an ordinary prudent person would act under the circumstances and was not negligent proximately causing plaintiffs' injuries; or

B. Defendant's actions, which may have contributed to plaintiff's injuries, were the acts of a reasonable prudent person under the circumstances responding to an unforeseen, unpredicted event happening without sufficient forewarning, to which event a reasonable prudent person would not have had an opportunity to have taken evasive action to avoid injuring the plaintiff.

In the majority opinion, this Court has not referred to a single event or occurrence which was unavoidable, nor has this Court distinguished the instant fact situation showing causation of plaintiff's injuries to be the result of "... any cause other than those circumstances which were under the control of an ordinary prudent man ...". *Butigan v. Yellow Cab Co.*, 320 P.2d 500, at 505, 65 ALR 2d 1, as quoted in *Porter v. Price*, supra, *Utah* page 82. In *Porter*, after discussing several portions of the *Butigan* decision, this Court said, at page 83, in justifying such an instruction under the epileptic fit type fact situation of *Porter*, rather than deciding as California did that it is an erroneous instruction as a matter of law:

"Such confusion (between the correctness of such defenses) is not apparent in the instructions here."

No dual instruction was given in this case.

Appellants request this court to reconsider its reasoning in support of the justification for giving dual instructions as contained in the majority opinion.

POINT II

THE COURT ERRED IN FAILING TO REVERSE THE TRIAL COURT'S REFUSAL TO INSTRUCT ON ALL THEORIES OF THE PLAINTIFFS' CASE, TO WIT: TWO INJURIES, THE LATTER OF WHICH COULD BE CAUSED BY NEGLIGENCE WITHOUT THE FIRST BEING SO CAUSED:

The majority opinion cites *Webb v. Snow*, 102 Utah 435; 132 P.2d 114, and *McDonald v. Union Pacific Railroad Co.*, 109 Utah 493; 167 P.2d 685, for the proposition that a party is entitled to have the jury instructed concerning their respective theories of a case when testimony is presented to support them. Without requested instructions No. 10 and No. 14, which read:

Instruction No. 10

"Should you determine the evidence to be that the minor child, Gregory Woodhouse, sustained an injury which was caused through no fault of the defendant but sustained a second injury which was caused through some act of negligence of defendant, as defined in these instructions, then you should award only such damages for injuries that the plaintiff may have sustained as a result of the second act. In the event there is not sufficient evidence before you to enable you to apportion between the damages sustained from the several injuries, then the defendant is liable for the

entire damages resulting from the incident in question."

Instruction No. 14

"The law imposes a duty on drivers of automobiles to act in conformance with a degree of care applicable to the circumstances in which they are located. If, in considering the evidence, you find that the defendant was acting within this standard when she commenced to back her automobile from Mrs. Jordan's driveway, the law recognizes that a person may deviate from the exercise of reasonable prudence and may subsequently become negligent from a later act."

"Should you find that the minor plaintiff sustained more than one injury from more than one distinguishable act, and you determine that a violation of the standard of care applicable to the circumstances was present on one occurrence but not on the other, then you should assess damages resulting from the negligent act only. However, if you cannot distinguish between the damages resulting from the negligent act or the non-negligent act, then you must assess all damages which the plaintiffs have incurred, if any, against the defendant, and plaintiffs are entitled to receive compensation for their total loss."

Plaintiffs' theory of two injuries was not presented. Either or both injuries, depending on the jury's finding of fault, conceivably could have been caused by defendant's negligence. The jury was not instructed on this point. The majority opinion invaded the province of the jury's prerogative to find as a separate fact that respondent did not act as a reasonable and prudent person after

receiving a warning of colliding with an object. The conclusion of full instruction of the jury by the trial court is not supported in any degree, since the evidence before the jury could support two distinct injuries. The cursory passing of Point II in appellants' brief, with a one-sentence disposition, does not under any legal rationale explain how a jury, without being instructed by a trial judge, could find separate acts of negligence causing separate and distinct injuries and, thereafter, without plaintiffs' requestion instruction No. 10, assess damages. As to the validity of this instruction, see *Newbury v. Vogel* 379 P.2d 811, Colorado (1963).

No evidence was raised by respondent at the trial, nor cited in respondent's brief, warranting any conclusion by the majority of this Court, other than that young Gregory Woodhouse was run over twice by respondent's car. The failure of this Court to reverse the trial court, constitutes a failure to entitle plaintiff to have all of his concepts of negligence placed before the jury for consideration, which error by the cases relied upon in the majority opinion, is sufficient grounds to entitle appellants-petitioners to a rehearing and a reversal of the trial court with instructions for a new trial.

Appellants petition this court to grant a rehearing in this case and to reverse its previous majority opinion, and grant them a new trial.

Respectfully submitted,

HATCH & McRAE